BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SUZANNE J. HULL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,069,585
AMEDISYS HOLDING, LLC	)	
Respondent	)	
AND	)	
	)	
TRUMBULL INSURANCE CO., INC.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the July 18, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Paul V. Dugan, Jr., of Wichita, Kansas, appeared for the claimant. Thomas G. Munsell, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from July 17, 2014, with exhibits attached, and the documents of record filed with the Division.

ISSUES

The ALJ found claimant's right knee injury was not the result of an activity of day-to-day living. He went on the find claimant's injury was not the result of a neutral risk, defining a neutral risk as one that has no particular employment or personal character, such as an unexplained fall. He found claimant's injury was not the result of a personal risk, as the evidence showed the claimant's right knee was bent and she exerted force on it when

getting out of her car, causing injury to the knee. The ALJ found no evidence that there was any injury to claimant's left knee. He opined exiting a vehicle to see a patient of a home health agency is not an activity of day-to-day living and, while it is true people get out of their cars every day and run the risk of twisting their knees while doing that, in this case, exiting the vehicle was part of the claimant's job duties.[1] Finally, he concluded twisting a knee while exiting a vehicle as part of an employee's job duties is not a neutral risk.[2]

As a result of these findings, all medical bills related to the claimant's right knee injury, including bills for treatment by Drs. Armsdorf and Janssen, were ordered paid as authorized medical expenses. Medical mileage was ordered paid. The physician who is currently providing treatment for the claimant's right knee was ordered as the authorized treating physician. Temporary total disability (TTD) was ordered paid at the rate of $587.00 per week from April 3, 2014, until claimant is released to return to work or has reached maximum medical improvement.

Respondent appeals arguing claimant's injury did not arise out of and in the course of her employment and was due to a neutral or personal risk. Therefore, the ALJ's Order should be reversed and claimant denied compensation.

Claimant argues the Order should be affirmed. Claimant contends her work injury resulted from getting out of her vehicle, while parked on an uneven surface and carrying work equipment and supplies, and as such those activities were connected to and inherent in the performance of her job.

The issues raised by respondent on appeal are:

1. Whether claimant's injury arose out of and in the course of her employment with respondent;

2. Whether the ALJ properly relied on and interpreted both case law and the Workers Compensation Act in order to determine whether claimant's alleged injury was in fact compensable;

3. Should claimant be found to have sustained injury to her right knee arising out of and in the course of her employment, is claimant entitled to TTD benefits as a result of the injury? (The Board must first determine its jurisdiction over this issue.)

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[1] The ALJ cited *Curtis v. St. Raphael Nursing Services, Inc.*, No. 1,062,498, 2013 WL 6920091 (Kan. WCAB Dec. 16, 2013), in support of this. (Actual Docket No. is 1,064,498.)

[2] The ALJ cited *Weatherford v. USD #229*, No. 1,058,469, 2012 WL 1142974 (Kan. WCAB Mar. 14, 2012), in support.

FINDINGS OF FACT

Claimant worked for respondent as a R.N. case manager. Her job was to go to patients' homes and provide both wound care and education on disease processes. This job required claimant to kneel and squat on different surfaces such as carpet, tile and concrete. The job also required some lifting. Claimant met with six to ten patients a day. She would spend anywhere from 30 minutes to 2 hours at each client's house. Claimant testified to working eight to twelve hours a day. Claimant used her personal vehicle and was paid mileage from one patient's house to the next. She was not paid mileage from her house to the first patient's house. Claimant traveled all over Sedgwick County, going to the south side of Wichita, Derby and Mulvane and also to Belle Plaine, Udall and Winfield. Claimant would park on various surfaces such as gravel, dirt, concrete, and brick roads. These surfaces were not always flat and level.

Claimant testified that when she arrived at a patients' home she would take in a bag full of supplies, a laptop computer and a planner. All of these items were in the front passenger seat of her vehicle.

On March 27, 2014, claimant arrived at the home of her first client of the day around 8:00 a.m. She testified the drive was flat, but slanted. While exiting her vehicle, claimant reached over, grabbing her laptop and planner, opened the door and stepped out with her left leg. Then, with both hands around her computer, she pushed off with her right leg and, as she stood, she heard a pop in her right knee. At that time, claimant's knee was bent and she was twisting as she pushed off with her right leg. Claimant was able to get out of the car and walk into the patient's home. She testified her knee was achy, but she was able to perform her work with the patient. As the day progressed, claimant's pain worsened. Claimant testified her pain got worse because the next three patients she saw that day had lower extremity wounds that had to be dressed. Those jobs required a lot of kneeling and squatting.

Claimant notified her employer of the accidental injury at the end of the workday on March 28 and an accident report was filled out. She reported pain in her right knee and left knee discomfort and filed her claim as a bilateral lower extremity injury.

Claimant met with a doctor at the Via Christi Clinic the same day she filed her claim. However, claimant's Exhibit No. 6 from the preliminary hearing limits claimant's complaints to the right knee only. She was provided with work restrictions of no kneeling or squatting. Claimant's restrictions were accommodated for two days. Claimant returned to Via Christi Clinic on April 2, 2014, again with only right knee complaints. She was again restricted to no lifting over 25 pounds with sit down duties and standing/walking as tolerated. Respondent was unable to accommodate claimant's restrictions. Claimant's last day of work was April 3, 2014.

Claimant received medical treatment with Dr. Nicole Arensdorf on April 26, 2014. She underwent an MRI and was sent for physical therapy. After physical therapy failed, claimant was referred to Dr. Kenneth Jansson for a surgical consultation. Dr. Jansson performed surgery to repair a torn meniscus and sent claimant to physical therapy at Via Christi in Derby and prescribed medication. Claimant was again given work restrictions of no squatting, climbing or kneeling. It was claimant's understanding she was only to have these restrictions for three months.

Claimant received a letter terminating her employment, effective June 25, 2014. Respondent told claimant they could not accommodate her restrictions and, since her medical leave ran out, her employment was terminated. The letter also indicated she owed $620.19 for benefits premiums paid on her behalf while she was on leave. Claimant's medical card paid for some of her doctor visits, her surgery and two therapy sessions.

Claimant testified her right knee pain is better since surgery, but is worse after physical therapy. She continues to have aching in her left leg on the outer part of the knee. The aching is worse when she kneels, squats, or walks or stands for long periods. Claimant is seeking medical treatment for her left knee also.

Claimant admits that getting in and out of her vehicle is something she does when she drives. She admits she was not performing any of her work duties at the time of the injury. Claimant testified her compensation did not start until she sees her first patient. She admitted that this injury could have happened anywhere. She agreed that getting in and out of a car is an activity of daily living. She also testified that were times where it was more difficult getting in and out of the car at a patient's house depending on where she parked. Claimant did not slip, trip or stumble while getting out of the vehicle. There was nothing about the concrete driveway that caused claimant's right knee to pop.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp 44-508(d) states:

> (d) "Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident'' shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp 44-508(f) states in part:

> (f)(1) "Personal injury'' and "injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury

> may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> . . .
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> (2)(B) An injury by accident shall be deemed to arise out of employment only if:
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
> (3)(A) The words "arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
> (iii) accident or injury which arose out of a risk personal to the worker; or
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2013 Supp. 44-508(g) and (h) state:

> (g) "Prevailing'' as it relates to the term "factor'' means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
> (h) "Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Respondent and its insurance company argue claimant's actions on the date of accident were no more than the normal activities of daily living, as claimant was simply exiting her car when her knee popped. The Kansas Supreme Court addressed this issue in *Bryant.*[3] Bryant began working for the respondent in 2001, missing several days due to persistent back pain. On March 2, 2003, Bryant stooped over to grab a tool out of his tool bag, and when he twisted back to work, he felt a pop in his back and experienced a sudden, severe increase of pain in his low back. He returned to work and, on May 13, 2003, while stooping over to weld, felt an explosive increase in pain. He ultimately underwent a multi-level fusion in his back. Bryant was awarded benefits by both the ALJ and the Board. However, the Kansas Court of Appeals reversed, finding Bryant was precluded from compensation because his injuries were the result of "normal activities of daily living."[4]

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[3] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

[4] *Id.* at 587.

The Kansas Supreme Court reversed the Court of Appeals, finding Bryant was not engaged in the normal activities of day-to-day living when he reached for his tool belt or bent down to weld. The Supreme Court analyzed the activities of daily living as follows:

> Although no bright-line test for what constitutes a work-injury is possible, the proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury? . . . [T]he test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment." 1 Larson's Workers' Compensation Law sec. 1.03[1] (2011).
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> . . .The focus of inquiry should be on whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement...but looks to the overall context of what the worker was doing–-welding, reaching for tools, *getting in or out of a vehicle,* or engaging in other work-related activities." (Emphasis added).[5]

Here claimant was engaged in a work activity of exiting her vehicle in the driveway of a client of respondent. She was carrying several items necessary for the performance of her job duties for respondent. Respondent seeks to isolate the activity of exiting the vehicle and characterizing it as a normal activity of daily living. The Kansas Supreme Court, in *Bryant,* rejects that legal theory.

Respondent also contests claimant's entitlement to TTD. Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Whether the employee suffered an accident, repetitive trauma or resulting injury;
2. Whether the injury arose out of and in the course of the employee's employment;
3. Whether notice is given;
4. Whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.[6]

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[5] *Id.* at 595-596.

[6] K.S.A. 2013 Supp. 44-534a(a)(2).

Respondent contests claimant's right to TTD. The issue of whether a claimant is entitled to TTD is not one of the jurisdictional issues listed in K.S.A. 2013 Supp. 44-534a. That is an issue over which an ALJ has the sole authority and jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[7]

The ALJ did not exceed his jurisdiction in ordering TTD. The award of TTD remains in full force and effect.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Based upon *Bryant,* claimant suffered a work-related accident and resulting injuries which arose out of and in the course of her employment with respondent.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Gary K. Jones dated July 18, 2014, is affirmed.

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[7] *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

[8] K.S.A. 2013 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of September, 2014.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Gary K. Jones, Administrative Law Judge